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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-5269

ROBERT EDWARDS, Petitioner

v.

THE STATE OF ARIZONA, Respondent

PETITIONER'S REPLY MEMORANDUM ON CERTIORARI

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November 19, 1979

The Respondent has stretched the record almost beyond recognition in its attempt to convince this Court that the case is one only of disputed fact. Contrary to the State's assertions, the record is straight forward and squarely presents the important issues raised by the Petition.

For example, the State seeks to remove all connection between the Police Sergeant (Bunting) to whom Edwards made his request for counsel on the night of his arrest, and his two subordinates (Marmion and Milne) who instituted an interrogation of Edwards the next day. The State says "Bunting had not told Marmion to speak to Edwards" (Response, p. 7). It says that two officers "who did not know about" Edwards' prior request to obtain counsel obtained the confession (Response, p. 14). But, the fact is that Bunting, who did know, specifically directed Milne to interrogate Edwards (II P. 58; Petition at 5). And as the dissent by the Arizona Supreme Court notes, he did it to see what could be gotten before Edwards could be appointed counsel that afternoon.

Similarly, the State blandly describes the record pertaining to prison garb as a situation in which Edwards simply "informed the Court" that his civilian clothes had been misplaced, and did not ask for a continuance or "refuse to go to trial" in "the clothes he was wearing" (Response, p. 9). The State then says "the record does not reflect that Petitioner was forced to stand trial in prison garb" (Response, p. 16). As has already been noted (Petition, p. 6), the record is replete with indication that Edwards was in "slippers and jailhouse clothes" (1 Tr. 9), unlike the first trial when, as the trial judge put it, "you had some good looking clothes" (1 Tr. 10). Edwards did not move for a continuance because the trial judge immediately made it clear that "the Court is not going to delay the proceedings to do anything about it". Id. Edwards made it quite clear that "I would not like to be presiding [sic] in the courtroom with jailhouse clothes" and that "I think that would be a prejudicial factor to me" (1 Tr. 73). The trial court suggested, after a

day's trial, that perhaps Salvation Army clothing be obtained (Id.), but by then the petit jury had been empanelled and the damage done.[1]

Perhaps the most untenable contention by the State is that Edwards invited error justifying the prosecutor's pointed, repeated comment on his failure to testify. It is said to have been an elaborate bootstrap affair by which he gave testimony while personally interrogating witnesses, instead of asking questions; and then used his summation to personally avow his innocence. Upon examination of the record, the whole theory comes apart.

For example, the State says (Response, p. 9) that Edwards brought out for the first time on cross-examination of the eyewitness the fact that the perpetrators were black -- but omits to mention that the matter came from a prior statement of the witness, and that Edwards was using the statement because it pointed up a discrepancy in the number of supposed participants. The State says (Response, p. 10) that Edwards in effect gave testimony, while questioning the accomplice. But a reading of the cited transcript referred (R. T. April 21, 1977, pp. 173, 178, 179) shows a normal cross-examination by leading questions, and not the giving of testimony.

Similarly, Edwards' summation was exactly what a lawyer would have done on his behalf. He discussed the evidence and drew inferences from it -- only referring to himself as "I" instead of as "my client". Appended to this Reply is an extract of page 12 of the Response, setting forth the State's contention that Edwards' summation was a personal avowal of innocence based upon facts he had supposedly "provided to the jury while questioning his [alibi] witness" (Response, p. 12). Also

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1 The State suggests (Response, p. 16) that the prison garb issue may not be ripe for determination by this Court because of the possibility of post-conviction proceedings under Arizona Rules of Criminal Procedure 32. It does not mention that such review seems barred by Ariz. R. Crim. P. 32.2 precluding issues adjudicated on direct appeal.

appended are copies of the transcript pages to which the State referred, which demonstrates that Edwards took no liberties with the record, and made no personal statements. The "invited error" theory cannot be allowed to preclude this Court's review of the egregious Fifth Amendment issue presented by the prosecutor's comment on Edwards' silence.

The State is also incorrect in characterizing as uniform the state of the law on reinterrogation after request for a lawyer. It contends that among the courts that have discussed the issue, there is agreement that there is no per se rule to prohibit further contact with an accused after he has indicated that he wishes to consult with an attorney prior to questioning. It should be noted that none of the cases cited on page 14 of the Response concern issues like that raised here. For example, United States v. Hauck, 586 F.2d 1296 (8th Cir. 1978); and United States v. Rodriguez-Gastellum, 569 F.2d 482 (9th Cir. en banc) cert. denied, 436 U.S. 919 (1978), involved explicit waiver of the presence of counsel:

> "The defendant then said retaining an attorney seemed like too much trouble and proceeded with the interview." Hauck, supra, 586 F.2d at 1297.

> "But in this case it is undisputed that there was no badgering, pressure or coercion. The waiver was explicit, clear and unequivocal." Rodriguez, supra, 569 F.2d at 488.

In this case the issue on waiver is whether one can be implied by total silence as to the request for a lawyer. As was said in a case cited by the Respondent, United States v. Charlton, 565 F.2d 86 ((6th Cir. 1977):

> "[T]he mere demonstration that the confession came without objection after resumption of questioning is inadequate evidence of waiver." 565 F.2d at 91.

It is evident from the cases cited by the Response that there is a split among the Circuits over what type of reinterrogation, if any, is proper after an accused asks to see a lawyer. For instance, the response

cites White v. Finkbeiner, 570 F.2d 194 (7th Cir., 1978), for the proposition that there is no per se rule prohibiting further contact. In fact, the 7th Circuit said in that decision that it adheres to the rule that an accused's right to the assistance of counsel can never be waived by a suspect whose initial request has been refused. It did not rule on this issue, but remanded for a further determination of whether the accused had in fact requested the assistance of counsel. However, the court stated:

> "In Miranda the Court appears to have set out a per se rule barring any custodial interrogation of a suspect after a request for counsel has been made. The Court said:
>
> > 'If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.' 384 U.S. at 474, 86 S. Ct. at 1628 (emphasis added).
>
> "In Williams, at least, we have construed the Court's above remarks as requiring the suppression of any statement obtained after a request for counsel had been made and not yet honored. See, 476 F.2d at 1252.
>
> "Nothing in Michigan v. Mosley, 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975), appears to require a retreat from that view. Mosley is distinguishable from the case before us because here, unlike in Mosley, the petitioner has alleged that he not only invoked his right to remain silent during his first custodial interrogation, but also asked to see an attorney. See, 423 U.S. at 101 n.7, 96 S. Ct. 321. As Mr. Justice White noted in his concurrence to Mosley,
>
> > 'the reason to keep the lines of communication between the authorities and the accused open when the accused has chosen to make his own decisions are not present when he indicates instead that he wishes legal advice with respect thereto. The authorities may then communicate with him through an attorney. More to the point,

> the accused having expressed his own view that he is not competent to deal with the authorities without legal advice, a later decision at the authorities' insistence to make a statement without counsel's presence may properly be viewed with skepticism.' 423 U.S. at 110 n.2, 96 S. Ct. 329." White v. Finkbeiner, 570 F.2d at 200, n. 1.

The confession would also be inadmissible under the criteria used by the 4th Circuit in United States v. Grant, 549 F.2d 942 (1977). Although the court held the confession admissible, Grant confessed after being asked only standard identification information. The court said:

> "It does not follow, though, that Miranda erects an absolute per se bar on any conversation with the accused by the investigating officers after the former has requested counsel. It only inhibits investigative interrogation related to the specific crime itself." 549 F.2d at 946.

Thus, the court recognized that a confession can't be used when elicited by investigatory interrogation, after the right to the assistance of counsel has been invoked as was done in the case at hand. That is precisely what occurred here, contrary to what occurred in Grant.

The Respondent attempts to distinguish Nash v. Estelle, 597 F.2d 513 (5th Cir. 1979) (en banc) on the grounds that there was a temporal break between the request for counsel and the purported waiver. This interpretation is unwarranted. The court in Nash, was concerned with a situation where the suspect's desires were expressed in such an equivocal fashion that it was permissible for the questioning officer to make further inquiry to clarify the suspect's wishes. Here, the Petitioner's wishes were clear from the beginning and needed no clarification. As the trial court found, he wanted the presence of an attorney, and he never communicated any contrary desire.

It is apparent, from both the Petition and Response, that the Courts of Appeals cannot agree on whether there is a per se rule that

prohibits all or any contact with an accused after he has asked for the assistance of counsel.

The Respondent also points out that the Court has granted certiorari in State v. Innis, ____ R.I. ____, 391 A.2d 1158 (1978), cert. granted, 440 U.S. 934 (1979). This does not prevent the granting of certiorari in the case at hand because in Innis the decision was entirely on Fifth Amendment grounds, whereas, this case is based on the Sixth as well as the Fifth Amendment. More to the point, however, is the situation so clearly presented here -- when an accused asks for a lawyer; cannot afford one; and will in the normal course be appointed one within hours. Can the police conduct a reinterrogation before counsel is appointed, which is timed and intended to occur before the accused gets the legal advice he wants? If so, does the mere regiving of the Miranda warning support a waiver of the original request for a lawyer? Such a case is not presented by Innis, which instead questions whether there was any interrogation. Here, there was.

We respectfully request this Court to see through the illusory factual complications thrown up by the State of Arizona, and to grant certiorari.

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APPENDIX

EXTRACT FROM RESPONSE OF STATE OF ARIZONA, P. 12 AND TRANSCRIPT PAGES CITED THEREIN

After the state's attorney had concluded, Edwards wrote on the easel "Defendant did not confess". (Id. at 5-97, 5-166.) Edwards then argued to the jury that, because Marmion and Milne only gave testimony of an oral confession, and had no evidence of a written confession, the jury should take that to mean that Edwards did not confess, and should "take that into what we call consideration, into evidence." (Id. at 5-111, 5-127, 5-128.) Later, he said "[a]s you heard in my statement, I was at a party," referring to the taped statement. [That had been admitted into evidence and played to the jury.] (Id. at 5-115.) He then discussed his alibi explanation, many of the facts which he had provided to the jury while questioning his witness. (Id. at 5-115 to 5-116; 5-40 to 5-42, 5-45 to 5-46, 5-48.) he again told the jury that his defense was that he was not there at the time. (Id. at 5-118, 5-134 to 5-135.) He made further references to statements he had made and explanations he had made, and denied making the confession of January 20, 1976. (Id. at 5-124, 5-126 to 5-128.)

Q Was you knowing me that year 1974?

A Yeah.

Q Do you know approximately, Miss Williams, of the incident that happened -- remember not the date explicitly because you say you don't remember the date because it's been a long time.

A Yeah.

Q Now, do you remember a date of a party that supposed to happen on the south side in that month?

A No.

Q Do you remember coming over to the south side, Mrs. Williams, in that time and picking any person up?

A Well, I don't know when it was.

Q Who did you pick up?

A I came to get you sure enough, but, you know, I don't know.

Q Was it a party going on when you came to pick me up that month?

A I didn't get out.

Q Is that across from the V.F.W.?

A Project.

Q Did you take me home, did you take me home or was anybody else with us when we left?

A No, I -- no.

Q All right. Where did you stay then, Mrs. Williams?

A On University.

Q That was on the north side, am I correct?

A That was Third and Queen.

Q Third and Queen. That time that you supposedly pick -- when you picked me up that date, Mrs. Williams, you don't remember what date it was, but you remember the party, you remember me going anyplace when we got to the house?

A I remember picking you up a couple of times. That's why I don't know. Once you got in, no, unless to the store or something.

Q I'm asking you a question. Do you remember me that time you pick me up at the party, do you remember me going anyplace?

You don't remember the dates, it's been so long. Do you remember me leaving the house, somebody coming over?

A No.

Q Do you remember anybody coming over during that night?

A It's been a long time, you know. I -- I don't know. I can't just say.

Q Who was there, Mrs. Williams, do you remember that?

A At my house?

Q Yes, at that time that we went home, who was there? Was there more people in your house, was it just me and you or who was there?

A Yes. You and myself and I guess my two daughters.

Q Did anybody come over at one o'clock that morning or two or three, did anybody come over late in the night, as late as one or two in the morning? Did anybody show that night, anybody, can you remember that?

A (Witness shakes head.)

Q Can you remember going to work that morning?

MR. LINGEMAN: Your Honor, could we have a date or time or some idea of when we are talking about? There is no foundation.

THE COURT: Well, the record to date may stand.

There is no question pending. You may ask another question.

MR. EDWARDS: Your Honor ----

THE COURT: She answered your last question and I'm leaving the answer in the record.

MR. EDWARDS: Oh.

THE COURT: Do you want the last question

Q You don't remember?

A (Witness shakes head.)

Q When I was staying with you in October of 1974, Mrs. Williams, did I ever mention to you or you say that time you picked me up at a party and took me home, did I ever mention to you, Mrs. Williams, that -- that I was in any kind of robbery or that I was, you know, did you ever know that I was in any kind of a robbery or murder or anything to that involvement?

A That night, no, you never told me nothing.

Q Did I tell you or did anybody else tell you?

A No.

Q Did you know -- did you have a doubt in your mind that I was any kind of involved in any robbery, any murder?

A Oh, I guess it never even crossed my mind something like that. I just went to pick you up at a party, but I always picked you up every night from somewhere.

Q And when you picked me up that night, you remember when you picked me up October that night?

A I don't know what night. I don't know.

Q You just know it was October, Mrs. Williams?

A No.

Q Well, when you picked me up you don't remember the date, when you picked me up, Mrs. Williams, in that month, I can say that you don't remember what date, but can I say did I ever leave the house, do you remember that?

A I don't know.

Q Did I ever leave, did I ever leave the house? Did I ever go out, do you remember that?

A If you ever went out anyplace at all?

Q When I went home, when you picked me up that night, did I ever leave the house? Did I go anywhere?

A I don't know.

Q Mrs. Williams, this is where you have to tell specific remember the dates, remember the time.

I think you testified in here, you remember the time and date in October.

A I did.

Q Yes, you did. Before you testified again you recall the time and you recall the date.

A No, no time.

Q You don't remember testifying before

MR. LINGEMAN: Your Honor, that question has been asked and answered many times.

THE COURT: Overruled.

THE WITNESS: Do I remember October '74?

Q (By Mr. Edwards) Yes.

A Yes, I remember October '74.

Q No date in October '74.

A No, I don't, no. No, I ----

Q Would you say that all you testified on the stand here is you remember picking me up at a party in October of '74; is that correct?

A It was one of those years. It must have been back in that time somewhere.

Q Across from the V.F.W. that you testified to?

A It was a project ----

Q Is that ----

A -- beside of the park.

Q You have -- on the south side, north, east, west, what side?

A It was some project right across from the V.F.W., right across the street right over there.

Q Mrs. Williams, something puzzles me here.

You testified, Mrs. Williams, that

attention and I ask you to do that because he is not an attorney.

When you do that, keep that in mind and make him tell you that and make him tell you what evidence has been introduced in this case, what has been produced in this courtroom to refute that.

He has confessed to the armed robbery and the armed burglary, and under the law the Court will give you, he has committed the murder. You have to understand the law if you are to follow your oaths. The law that I have just read to you. You have to find him guilty of all three offenses unless you believe that Mr. Mungia died of something else, that this wasn't the cause of his death. There is just no evidence to support that.

Thank you, very much.

THE COURT: Mr. Edwards, you may make the closing argument.

(Whereupon, Mr. Edwards goes to the easel and writes the following: "Defendant did not confess.")

Ladies and gentlemen of the jury, I thank you for being patient and considerate and listening to this case.

...ed in the statement he introduce it from his mind after he has talked to me and made a transcript of the statement.

He never presented the statement. They never presented anything to what a man wrote up his self on a piece of paper and then he says I was involved in the crime.

You must take the statement of two. The statements of evidence that are presented to you. Must take the evidence that are presented to you, ladies and gentlemens.

The evidence that you heard from my own voice, that you heard on tape, that you heard with voluntarily made, you must take that all because it was presented as evidence.

And then you must take, and then the statement that the police alleged against me was not on tape, was -- was not anywhere, but not what you call from mine, what I wrote up his self. Wrote it himself.

Ladies and gentlemens, you must take that into what we call into consideration, into evidence.

Now, we get on what we can say the State produced one more witness in this case. The State produced a witness that was named, I

gentlemens, not consumptions, but we are talking about facts.

You must base law on fact, not opinion and theories.

Now, you seen the whereabouts when Mrs. Williams came on the stand and she testified. The lady didn't remember what date it was. Mrs. Williams didn't remember.

She remembered the month because three years had been a long time to remember the specific date, to remember what time was she -- she said she remembered that month.

As you heard in my statement, I was at a party. You heard that this same woman, this same young lady, Mrs. Williams, come and got me.

She said as she come and got me we went home. As we went home you heard me cross-examine this witness, Mrs. Williams, and ask her did I ever leave. She said no.

And did I ever go anywhere? She remembers -- she do not remember the date, but you heard my statement and it was the same date, October 9th of 1976, and she testified to that and the only time she remember was from the same thing a party across from the V.F.W. on the south

side that she come and pick me up and we went home and I never left the place. The crime was supposed to happen that night, but I was there.

She testified to that and she testified to the fact that I was there and no one came over. I didn't even know where.

You must take her testimony under consideration and under evidence she testified.

Now, ladies and gentlemens of the jury, I must talk to you about a person, a person of what we call a felony-murder rule.

A felony-murder rule is when a person dies it's considered murder.

A crime have to be committed and a person must die and this is considered murder.

But, you see, that never -- and never reasonable, what we call a reasonable doubt.

It was a reasonable doubt in that because the State never proved that the man died at the scene of the crime.

The only one can tell you that the person died at that scene of the crime was the man himself. And he was what we call died.

You have to realize that Mrs. Esparza who was a waitress at the bar, she said the man, after he was supposedly robbed, got up

consider that something accidentally or anything might happen because you know and you're going to do a crime.

But then you have to realize it's the evidence shown that a man is supposedly committed a crime has put on evidence was -- he was not involved in the crime.

My defense was not alleged of a withdrawal defense. My defense was alleged that I was not there at the time. I did not cause death or no armed robbery or no burglary. This was my defense.

I tried to put my defense as possible as I know how.

Like the district attorney said, I'm not a lawyer. No, I'm not a lawyer. I have attorney, but I'm defending myself. Yes, I am. I'm defending myself because -- and then I have a reason to defend myself.

I have a reason to defend myself, is my possibility because then I know that I can tell or I can explain, but what -- what's the reason, the truth to you. I can never say that I can get up and perform to you like a attorney. You must understand. You must bear with me that everything I can explain to you that you must

Only one thing that credit, and you must weigh as evidence, as evidence must be weighed that you must understand the evidence and the evidence you must weigh are not only one side of the facts, you must weigh all the facts. You must weigh the State and you must weigh the defense. You weigh all the facts. You must under all the facts that been presented to you.

And you must understand that a reasonable doubt of the man is innocent of what they commit a man or try to allege a man of a crime that is being committed.

A witness stated here today to you, it was on the stand, a witness that came forth and I presented as well as the State presented.

They presented a statement to you first and this statement, what they call was a alibi. You heard the whole alibi statement, but what I call it was the whereabouts statement.

A person that testified that you heard of Williams' trial, you heard of Soto, and you heard these people. These peoples' names in this trial.

You heard a Mrs. Delores Williams, that she got on the stand. You seen the lady. You seen this lady was very nervous because she

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That's all he's got, but all the defendant presented to you, you seen the statement presented to you, you seen the statement voluntary made, the statement of my whereabouts, where I was with the same Delores Williams that came up on the stand.

I had left her and was arrested 20 minutes after that and the police never went back to her to follow my story. Never did.

And when Sgt. Bunting, when he left he said that I did not say I was involved and they had time enough to go over there and to know that she was there, but they never did.

Then they wait until 1977. The only thing -- the only thing that the prosecution can turn, that he talk about presented confession, he never permitted that anywhere that the police report that came to you was in evidence. A police report came to you in evidence that Mr. Marmion -- Mr. Marmion was a police that supposed to obtain the next day, that he told -- that he told you when I left that I asked for a attorney.

He told you that when I left, Bunting was on the stand, that then I was carry to jail. Then I explained that I was taken to confinement and I was brought out of confinement

the next day.

That a police officer, Marmion, came down to talk to me and that's when he talked to me he said he played a state -- a tapement (sic) of Mr. Reed's.

He said then that -- that after he played a statement to Mr. Reed, then I said, "I do not want this tape because it can be used against me."

And then he said that then he -- I told him my involvement in the case. And then he wrote it up. Then he left and he put it on tape.

But, you see, ladies and gentlemens of the jury, that it was never brought to you on tape. He said that then as he wrote it up, ladies and gentlemens, he used one thing because he had to use this thing, it was not used against me on tape. He had to because then if a man has enough intelligence, ladies and gentlemens of the jury, to be telling the truth, he do not involve his self. He do not involve what we call put his self in a position that he is telling the truth. He don't care if he is intelligent enough to make a taped statement to produce to you.

I came back again. The police

officer, that's the only thing they could do, to call themselves to present a case to you. Does the man come back and say, "I have a confession. I have a confession that he stated to you"?

Marmion. I remembered it from my mind because I copied it down.

I said it to you. I said it, but it was on tape. But the police officers come at the jail house and say I say something verbally. And then he wrote that down. And he transcribed it and put it on tape, but you never told it was involuntary and he never told it was on tape or nothing like that.

The statement must be involuntary (sic).

Ladies and gentlemens of the jury, you must consider all of this evidence that is brought in to you. You must consider this evidence because you are the judges in this case.

You judge -- youre judges of what I'm saying in the terms that you judge all the evidence, but as I know that I'm not a attorney at law, and I know that people of the jury not attorney at -- any kind of law, and any kind of a degree, but they must understand that the

In that time or that place or that position that this is the man, that man, them type of people.

I'm just a mens, a human being. Sure enough I'm a black man, but judge me, ladies and gentlemens, as the evidence has presented to you, not a person accusations that the D.A. presented to you, but judge me as a human being and as all the evidence that has been presented.

And because of these reasons, ladies and gentlemen of the jury, that all the evidence I have presented to you as well as the State, you weigh this evidence that I put on my defense. Police officer, witnesses of credibility and my whereabouts. This was my defense.

And then the defense that the State has put on and the only defense he could put on, because he did not weigh the evidence that he had, he had what we call evidence of what he could drive to you was a statement. And the statement was, he could drive to you, was that a man said he was involved. A man say he was involved in a crime.

But, ladies and gentlemens of the jury, me, I'm saying I wasn't involved in no crime. I did not participate. I did not aid

and abet and I did not participate in no crime.

I'm saying to you I'm innocent of these charges they have towards me because innocent lies on the basis I have presented to you, the fingerprints. That is a factual basis. A basis that produces evidence and you must weigh that. Eyewitnesses evidence. You must weigh all of them facts.

And people. Eyewitnesses have told the police at the scene of the crim all of the evidence. And the credibility of what a person consider or what a person can say of everytime a dominating thing. Look around and it's a dominating factor in this case.

And as I stand here today to you, ladies and gentlemens of the jury, I stand with you as to explain, as I told you before, I'm not attorney at law, but explain to you that my defense -- and my defense is my innocence as well as I can explain. That's why, like I told you, this is a serious case. This is a very serious case. You must hear and understand the things that are alleged in this crime and all the evidence, and because a man sits here to explain to you the evidence that has been presented.

The only way I can explain to you

MR. LINGEMAN: No.

THE COURT: All right. It's five minutes to six and I'm going to have the bailiff take the jury out to dinner and I'm going to take this request and your record that you just made under advisement and meet back here at seven thirty this evening and make a ruling on it.

I am going to send a written note back to the jury. Will you take this down and type it: "I have your question. I'm not able to answer the question for you until -- I'm not able to answer the question for you at this time. I am going to send you out to dinner with the bailiff and when you return from dinner I will have an answer for your question shortly."

Now, there is one other thing I want to put on the record.

I am going to have these marked as Court's exhibits, not to go to the jury.

The first one is what Mr. Lingeman wrote commencing his closing argument and it says the defendant confessed. It will be marked Court's Exhibit No. 1.

And the second one is what the defendant wrote commencing his closing argument. "The defendant did not confess." That will be